87- 526

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1987

BOBBY FELDER,
Petitioner,

v.

DUANE CASEY, *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE WISCONSIN SUPREME COURT

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September, 1987

QUESTION PRESENTED

Whether states may condition access to their courts in actions brought under 42 U.S.C. §1983 by requiring plaintiffs to comply with state notice of claim statutes?

PARTIES

The petitioner in this Court is Bobby Felder, who was the plaintiff in the proceedings below. Respondents are Duane Casey, Patrick Eaton, Robert Farkas, Peter Pochowski, Robert Connolly, Edward Heideman, Stanley Olsen, Roger Weber, Michael Kempfer, and Gary Hoffman.

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The Petitioner, Bobby Felder, respectfully prays that a writ of certiorari issue to review the opinion and judgment of the Wisconsin Supreme Court, entered in this proceeding on June 24, 1987.

OPINIONS BELOW

The opinion of the Wisconsin Supreme Court reversing the Court of Appeals is reported at 139 Wis.2d 614, 408 N.W.2d 19 (1987), and is reprinted at pp. A-1 to A-20 of the Appendix to this Petition.

The opinion of the Wisconsin Court of Appeals, dated April 24, 1986, is unreported but is reprinted at pp. A-21 to A-24 of the Appendix to this Petition.

JURISDICTION

The Wisconsin Supreme Court issued its opinion on June 24, 1987, reversing the decision of the Wisconsin Court of Appeals and remanding the case to the Milwaukee County Circuit Court with instructions to dismiss the action.

The jurisdiction of this Court to review the opinion and judgment of the Wisconsin Supreme Court is invoked under 28 U.S.C. §1257(3).

STATUTES INVOLVED

This case involves 42 U.S.C. §1983 (1982), which provides in relevant part:

> Every person who, under color of any statute, ordinance, regulations, custom or usage, of any State or Territory, or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Relevant portions of the notice of claim statute, WIS. STAT. ANN., §893.80 (West 1983 & Supp. 1986), provide:

> §893.80 Claims against governmental bodies or officers, agents or employees; notice of injury; limitation of damages and suits.
>
> (1) Except [with respect to medical malpractice claims] as provided in sub.(1m)., no action may be brought or maintained against any ... governmental subdivision or agency thereof nor against any officer, official, agent or employe of the ... subdivision or agency for acts done in their official capacity or in the course of their agency or employment upon a claim or cause of action unless:
>
> (a) Within 120 days after the happening of the event giving rise to the claim, written notice of the circumstances of the claim signed by the party, agent or attorney is served on the ... governmental subdivision or agency and on the officer, official, agent, or employe under s.801.11. Failure to give the requisite notice shall not bar action on the claim if the ... subdivision or agency had actual notice of the claim and the claimant shows to the satisfaction of the court that the

> delay or failure to give the requisite notice has not been prejudicial to the defendant ... subdivision or agency or to the defendant officer, official, agent or employe; and
>
> (b) A claim containing the address of the claimant and an itemized statement of the relief sought is presented to the appropriate clerk or person who performs the duties of a clerk or secretary for the defendant... subdivision or agency and the claim is disallowed. Failure of the appropriate body to disallow within 120 days after presentation is a disallowance. Notice of disallowance shall be served on the claimant... No action on a claim against any defendant... subdivision or agency nor against any defendant, officer, official, agent or employe, may be brought after 6 months from the date of service of the notice, and the notice shall contain a statement to that effect.

STATEMENT OF THE CASE

In the early evening of Independence Day, July 4, 1981, and in the presence of his wife, children, and neighbors, [A-18] Bobby Felder was stopped for questioning by Milwaukee police officers outside his home in Milwaukee, Wisconsin. The police officers were combing the neighborhood looking for an armed individual who was reported to be in the area and who was later apprehended and arrested. [A-3]

According to police reports, Felder was not cooperative and began to shout profanities, thereby attracting neighborhood attention. Felder's neighbors, however, successfully intervened and exonerated him, and the police reportedly told Felder to leave the scene and go home. Felder, allegedly, continued to be loud and abusive and reportedly pushed an officer. [A-3]

Minutes later, members of the Milwaukee Police Department Tactical Enforcement Unit arrived and proceeded to arrest Felder for disorderly conduct. At this point according to Felder and neighbors testifying at the jury trial, the police officers, including members of the Tactical Enforcement Unit, beat Felder with batons, carried him to a paddy wagon

while he was partially unconscious, and threw him through the air and into the paddy wagon. [A-3] Felder was charged with a municipal (civil) ordinance violation of disorderly conduct, but the Milwaukee City Attorney subsequently dropped the charge. [A-3; A-22]

Felder is black and all the police officers present at the scene are white. [A-3]

On April 2, 1982, less than nine months after his arrest, Felder filed this §1983 action in the Milwaukee County Circuit Court seeking compensatory and punitive damages against one known Milwaukee police officer, respondent Kempfer, and unknown officers named as John Doe. On January 4, 1983, Felder filed a First Amended Complaint renaming respondent Kempfer and adding respondent Hoffman and two additional Milwaukee police officers as defendants. On March 8, 1984, Felder filed a Second Amended Complaint renaming the four police officers already named plus an additional eleven defendants.

This action was filed under §1983[1] and alleged violations of rights secured by various amendments to the United States Constitution, including the fourth and the fourteenth, as well as state law tort and conspiracy claims. [A-4]

In each of their Answers, the defendants raised the affirmative defense of non-compliance with WIS. STAT. ANN. §893.80 (West 1983 & Supp. 1986) (hereinafter cited as "§893.80"), the notice of claim requirement. [A-4]

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[1]Felder also included a claim based on 42 U.S.C. §1985(2) (1982) in which he alleged a racially-motivated conspiracy to interfere with his access to the state courts. All the Wisconsin courts in this case have treated the §1983 and §1985(2) claims identically for purposes of the notice of claim issue, and in this Petition Felder only refers to his §1983 claims.

On March 4, 1985, this case went to trial against ten Milwaukee police officers on state and federal claims involving false arrest, the use of excessive force, false imprisonment, and conspiracy. [A-4] The case was heard before a jury and presided over by the Honorable Robert W. Landry, Circuit Court Judge for Milwaukee County.

During four days of trial, Felder and his wife testified, as did several of his neighbors who had witnessed the events in question. Plaintiff also called several police officer defendants adversely and presented medical testimony by his physician. In addition, plaintiff called as a witness Milwaukee Alderman Roy Nabors, an elected member of the City of Milwaukee Common Council, who had responded to a call from Felder's neighbors that evening and who testified about the police investigation Alderman Nabors initiated into the incident.

On March 4, 1985, prior to the start of the trial, the trial court had rendered an oral decision rejecting the defendants' motion to dismiss the action based on Felder's non-compliance with §893.80, the notice of claim statute. On March 8, 1985, after four days of trial testimony and evidence, the trial court issued a written decision consistent with its oral decision. Finally, at the close of plaintiff's case on March 8, 1985,[2] the trial court again denied defendants' mo-

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[2]In summarizing the history of the case, the Wisconsin Supreme Court stated that the trial court dismissed Felder's civil rights claims after the defense rested its case, [A-4] but that statement is erroneous. The trial court in its Amended Order for Judgment noted that it ruled on the motions at the close of plaintiff's case. [A-25]

This discrepancy, however, has no bearing on the substance of this Petition as the decision of the Wisconsin Supreme Court rests squarely on the holding that Felder was required to comply with the notice of claim statute as a condition of bringing a §1983 action in the Wisconsin courts.

tion to dismiss based on Felder's failure to comply with §893.80 with respect to his federal claims.[3]

At the March 8, 1985, hearing, however, the trial court *sua sponte* dismissed Felder's §1983 and related federal rights civil claims against the eight respondent poice officers named in the Second Amendment Complaint based on the statute of limitations.[4] With respect to the two remaining defendants, the trial court ordered the case to proceed, but Felder's councel refused after a mistrial motion was denied, and the trial court dismissed the §1983 claims against respondents Kempfer and Hoffman for failure to prosecute. [A-26]

The Amended Order for Judgment, dated May 23, 1985, rejected the defendants' argument that plaintiff's §1983 claims should be dismissed for failure to comply with §893.80, the notice of claim statute. [A-26 A-27] The trial court, however, reaffirmed its earlier decision dismissing the §1983 claims. [A-27]

Felder then successfully appealed to the Wisconsin Court of Appeals, which on April 24, 1986, unanimously reversed the decision of the trial court and held that the three-year limitations period for personal injury actions in WIS. STAT. ANN. §893.54(1) (West 1983) applied retroactively to the

[3]The trial court, however, dismissed Felder's state law claims based on non-compliance with §893.80. [A-4] The dismissal of the state law claims is no longer an issue in this case.

[4]In dismissing the §1983 claims based on the statute of limitations, the trial court initially ruled that the two-year limitations period for intentional torts in WIS. STAT. ANN. §893.57 (West 1983) was applicable. After this Court's April 17, 1985, decision in *Wilson v. Garcia*, 471 U.S. 265 (1985), the trial court ruled that the three-year limitations period for "injuries to the person" in WIS. STAT. ANN. §893.54(1) (West 1983) applied to §1983 actions in Wisconsin but only prospectively. Thus, it reaffirmed its earlier decision dismissing Felder's §1983 claims based on the statute of limitations. [A-27]

present §1983 case. The defendants cross-appealed, arguing that Felder's claims "are barred by his failure to comply with the notice of claim statute §893.80" and by *Parratt v. Taylor*, 451 U.S. 527 (1981). [A-23] The Wisconsin Court of Appeals, however, rejected the cross-appeal and summarily reversed those portions of the judgment dismissing Felder's federal civil rights claims against the eight respondents who had been brought into the case by the Second Amended Complaint. [A-24]

The Wisconsin Supreme Court granted review in a petition filed by the ten respondent Milwaukee police officers. The court also granted Felder's cross-petition, which was based on the uncertainty of the disposition of his §1983 claims against the two police officers against whom his action was timely. [A-5]

On June 24, 1987, the Wisconsin Supreme Court by a four-three vote reversed the decision of the Wisconsin Court of Appeals and remanded the action to the trial court with instructions to dismiss the action. The court did *not* address either the statute of limitations or the applicability of *Parratt*, but rather disposed of Felders's §1983 claims against all ten respondents solely because of Felder's failure to comply with the notice of claim requirement in §893.80.

Initially, the Wisconsin Supreme Court concluded that as a matter of state law the notice of claim requirement applied to §1983 actions filed in the Wisconsin courts. [A-9] The court then rejected Felder's federal supremacy argument and held that "failure to comply with §893.80, Stats., bars a litigant who is pressing a federal civil rights claim from proceeding with that claim in state court." [A-12]

In concluding that Wisconsin courts could apply the notice of claim statute to §1983 actions, the Wisconsin Supreme Court relied heavily on its decision in *Kramer v. Horton*, 128 Wis.2d 404, 383 N.W.2d

54, *cert. denied*, 107 S.Ct. 324 (1986), in which it had held that the tenth amendment permitted states to require plaintiffs to exhaust administrative remedies as a condition of bringing §1983 actions in state courts. [A-11—A-12]

> While the Constitution vests in Congress "the power to prescribe the basic procedural scheme under which claims may be heard in federal courts,"... it reserves to the state legislatures and state courts the power to prescribe the procedural scheme under which claims may be heard in state court. [A-11 A-12](quoting *Kramer*, 128 Wis.2d at 417, 383 N.W.2d at 59)

The court then characterized the notice of claim statute as "procedural" and stated:

> that litigants who choose to press their claims in state court cannot "elect" to ignore state procedural rules. The right to sue in state court is accompanied by the corollary duty to abide by certain rules and procedures. Section 893.80 is an example of just such a procedure. [A-12]

In reaching this decision, the Wisconsin Supreme Court explicitly acknowledged the existence of federal court decisions refusing to apply state notice of claim statutes to §1983 litigation, including not only a case from the lower federal courts in Wisconsin, *see Perrote v. Percy*, 452 F.Supp. 604 (E.D. Wis. 1978), but also decisions from the Ninth, Tenth, and District of Columbia Circuits. *See Donovan v. Reinbold*, 433 F.2d 738 (9th Cir. 1970); *Willis v. Reddin*, 418 F.2d 702 (9th Cir. 1969); *Rosa v. Cantrell*, 705 F.2d 1208 (10th Cir. 1982), *cert. denied*, 464 U.S. 821 (1983); *Brown v. United States*, 742 F.2d 1498 (D.C. Cir. 1984)(en banc), *cert. denied*. 471 U. S. 1073 (1985). Nonetheless, the Wisconsin Supreme Court found these federal court decisions inapplicable because the present case involved whether the notice of claim statute could be applied to §1983 claims brought in *state* courts. [A-11]

In upholding the application of the notice of claim statute to §1983 actions, the Wisconsin

Supreme Court noted that the requirement does not preclude all possibility for recovery based on violations of federal law. "The plaintiff remains free, of course, to litigate the civil rights claims in federal court." [A-12]

In addition, the Wisconsin Supreme Court addressed whether the failure of the plaintiff to give statutory notice within the 120-day period contained in §893.80(1)(a) could be excused since, under Wisconsin law, such failures are not fatal if the city had "actual notice" of the claim and the plaintiff could show that the failure to give notice was not prejudicial. [A-12—A-13]

Without reaching whether the absence of statutory notice was prejudicial, [A-14] the court held that neither the intervention of a Milwaukee alderman within hours of the arrest (and his subsequent written communication) nor the investigations by the city met the "actual notice" requirement of the statute. [A-12—A-14]

In discussing this issue, the Wisconsin Supreme Court described the "notice" that was given.

> It is conceded that a police investigation into Felder's arrest was underway shortly after its occurrence. The record contains several police reports, each of which was individually prepared by the various officers who were present during the arrest or who directly participated in it. The police captain in charge of the district in which the arrest occurred was made aware of the arrest and of the various police reports. The record also reflects that Alderman Nabors contacted then police chief Harold Breier, by letter, to personally inform him of the Felder incident. [A-13]

Nonetheless, the court held that the "notice" given did not meet the "actual notice standard" of its earlier decisions under which "documents" constituting "adequate notice" had usually, at a minimum, cited the facts giving rise to the injury

and indicated an intent on the plaintiff's part to hold the city responsible. [A-14] Thus, neither the communication from the alderman nor via the police reports was sufficient.

Therefore, the Wisconsin Supreme Court held that the failure to comply with §893.80 by providing either statutory or actual notice precluded Felder from proceeding futher with his §1983 action in state court. The court then reversed the decision of the Wisconsin Court of Appeals and remanded to the trial court with instructions to dismiss Felder's action.

Three justices of the Wisconsin Supreme Court dissented.

Justice Shirley S. Abrahamson, joined by Chief Justice Nathan S. Heffernan, concluded that §893.80 was inapplicable to §1983 actions. First, they looked to the legislative history of §893.80, which was adopted to restore partially governmental immunity after its abrogation in *Holytz v. Milwaukee*, 17 Wis.2d 26, 115 N.W.2d 618 (1962), and concluded that the Wisconsin legislature did not intend that §893.80 apply to §1983 actions. [A-17] Second, they concluded that the application of §893.80 to §1983 actions was inconsistent with controlling principles of federal law. [A-17]

In a separate dissenting opinion, Justice William A. Bablitch characterized the notice of claim statute as a "subtlety of state procedural law that must give way to the vindication of federal rights in state courts." [A-19] He also looked to the purpose of the notice of claim statute of avoiding prejudice to governmental units by the late filing of claims and concluded that the notice given in the present case permitted a prompt investigation that "more than fulfilled" the purpose of the statute. [A-20]

REASONS FOR GRANTING THE WRIT

I. THE WRIT SHOULD BE GRANTED BECAUSE THE DECISION OF THE WISCONSIN SUPREME COURT CONFLICTS DIRECTLY WITH DECISIONS OF OTHER STATE COURTS OF LAST RESORT.

The decision of the Wisconsin Supreme Court requiring compliance with §893.80, the notice of claim statute, as a condition of pursuing §1983 actions in the Wisconsin courts is in direct conflict with decisions of state courts of last resort in California, Idaho, and Oklahoma. In each of these states, the state supreme court has held that as a matter of federal law, plaintiffs in state court §1983 actions need not comply with notice of claim statutes.

In *Williams v. Horvath*, 16 Cal.3d 834, 548 P.2d 1125, 129 Cal. Rptr. 453 (1976), Justice Mosk, writing for a unanimous court, noted the close relationship between the 100-day California notice of claim requirement and the legislative restoration of governmental immunity[5] and rejected application of the notice of claim requirement to state court §1983 actions. "[T]he purpose of underlying section 1983 ... may not be frustrated by state substantive limitations couched in procedural language." 16 Cal. 3d at 841, 584 P. 2d at 1129-30, 129 Cal. Rptr. at 457-58.

In *Overman v. Klein*, 103 Idaho 795, 654 P.2d 888, 892 (1982), the Idaho Supreme Court held that the 120-day notice of claim requirement for suits against state officials was inapplicable to §1983 actions.

In *Willborn v. City of Tulsa*, 721 P.2d 803 (Okla. 1986), the Oklahoma Supreme Court addressed the

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[5]The Wisconsin notice of claim statute, §893.80, like the California Tort Claims Act, was enacted in response to the judicial abrogation of governmental immunity. *See* A-17 (Abrahamson, J., dissenting). *See also* Legislative Council Report on §893.80 (1976) *reprinted in* WIS. STAT. ANN. §893.80 (West 1983).

duty of the Oklahoma courts to entertain §1983 claims when parallel state remedies were barred by the six-month notice of claim requirement of the Political Subdivision Tort Claims Act. After applying the notice of claim requirement to the state remedies, the court observed that "the remedy provided by §1983 must be independently enforceable even if a parallel state remedy is available" and held that §1983 actions must be heard in state courts even if the state remedy is barred. *Id.* at 805.

In addition to these decisions of state courts of last resort, intermediate appellate courts in Colorado, New Jersey, and Texas have refused to apply notice of claim requirements to state court §1983 actions on federal grounds. *See Mucci v. Falcon School District*, 655 P.2d 422, 423 (Colo. Ct. App. 1982) (rejecting application of 90-day Colorado notice of claim requirement to §1983 actions); *Fuchilla v. Layman*, 210 N.J. Super. 574, 510 A.2d 281, 285-86 (App. Div. 1986) (rejecting application of 90-day notice of claim requirement of New Jersey Tort Claims Act to §1983 actions); *Spencer v. City of Seagoville*, 700 S.W.2d 953, 955-56 (Tex. Ct. App. 1985) (rejecting application of Texas Tort Claims Act notice of claim requirement to §1983 action because of unavailability of other remedies).

Other state courts, however, have applied notice of claim requirements to state court §1983 actions. In *423 South Salina Street v. City of Syracuse*, 68 N.Y.2d 474, 503 N.E.2d 63, 410 N.Y.S.2d 507 (1986), *appeal dismissed*, 107 S.Ct. 1880 (1987), the New York Court of Appeals applied a notice of claim provision of the New York statutes to §1983 actions.[6] Similarly, in *Clark v. Indiana Department of Public Welfare*, 478 N.E.2d 699 (Ind. Ct. App. 1985), *cert. denied*, 106 S.Ct. 2893 (1986), the Indiana Court of Appeals held that the state tort claims act notice provision is a "procedural precondition to sue" that "overrides the procedural framework of §1983 when the litigant chooses a state court forum." 478 N.E.2d at 702.

[6]This is consistent with an earlier decison in which the New York Court of Appeals applied a similar notice of claim requirement to a state court action under 42 U.S.C. §1981. *See Mills v. County of Monroe*, 59 N.Y.2d 307, 451 N.E.2d 456, 464 N.Y.S.2d 486, *cert. denied*, 464 U.S. 1018 (1983).

The split among state courts of last resort on this issue is deep and irreconcilable and will not be resolved by the state courts themselves.

Nor will resolution of this conflict come from the federal courts, which have nearly unanimously rejected the application of notice of claim requirements to §1983 actions.[7] In fact, each of the state appellate courts that require compliance with notice of claim statute in §1983 litigation, including the Wisconsin Supreme Court in this case, has acknowledged the existence of federal court cases refusing to apply notice of claim requirements to §1983 litigation but has rejected those cases or treated the decisions as not being applicable to §1983 cases filed in state courts.

Therefore, this conflict among state courts of last resort on the application of notice of claim requirements to state court §1983 litigation will only be resolved if this Court reviews a state court §1983 case. Only such a case will give this Court the opportunity to address directly whether states may require compliance with notice of claim statutes as a condition of pursing §1983 claims in state courts.[8]

[7]The Second, Fifth, Ninth, Tenth, Eleventh, and District of Columbia Circuits reject the application of notice of claim requirements to §1983 actions, while the Third Circuit has upheld the application of a notice of claim requirement in a §1983 case arising in a territory. *See infra* Part II.

[8]The experience in the state courts on the closely related §1983 exhaustion of administrative remedies issue since *Patsy v. Board of Regents of the State of Fla.*, 457 U.S. 496 (1982), *see* Part III, *infra*, strongly suggests that only this Court's review of a §1983 notice of claim decision from a state court will resolve definitively whether *state* courts that entertain §1983 actions must disregard state notice of claim requirements.

II. THE WRIT SHOULD BE GRANTED BECAUSE THE DECISION OF THE WISCONSIN SUPREME COURT CONFLICTS WITH DECISIONS OF THE UNITED STATES COURTS OF APPEALS AND RAISES IMPORTANT ISSUES IMPLICATING ESTABLISHED PRINCIPLES OF FEDERALISM.

The decision of the Wisconsin Supreme Court conflicts with decisions of the Courts of Appeals of the Second, Fifth, Ninth, Tenth, Eleventh and District of Columbia Circuits, all of which have rejected the application of state notice of claim requirements to §1983 litigation. *See Brandon v. Board of Education of the Guilderland Central School District*, 635 F.2d 971, 973 n.2 (2d Cir. 1980) (rejecting application of New York's three-month notice of verified complaint requirement for commencing non-tort suits against school districts); *Ehlers v. City of Decatur*, 614 F.2d 54, 56 (5th Cir. 1980) (rejecting application of Georgia's ante-litem notice statute requiring written notice of claim to be presented to a municipality within six months of the events on which a claim is based); *Willis v Reddin*, 418 F.2d 702 (9th Cir. 1969) (rejecting application of California 100-day notice of claim requirement); *Donovan v. Reinbold*, 433 F.2d 738, 741 (9th Cir. 1970) (same); *Rosa v. Cantrell*, 705 F.2d 1208, 1221 (10th Cir. 1982) (rejecting application of Wyoming notice of claim requirement), *cert. denied*, 464 U.S. 821 (1983); *Majette v. O'Connor*, 811 F.2d 1416, 1418 (11th Cir. 1987) (rejecting application of Florida three-year notice of claim requirement). *Cf. Brown v. United States*, 742 F.2d 1498, 1500 & n.2 (D.C. Cir. 1984) (en banc) (rejecting application of District of Columbia six-month notice of claim requirement to "constitutional tort" claims, including *Bivens* and §1983 actions), *cert. denied*, 471 U.S. 1073 (1985). *But see Deary v. Three Un-Named Police Officers*, 746 F.2d 185, 189 n.2 & 193 (3d Cir. 1984) (failure to comply with the notice of

claim requirement of the Virgin Islands Tort Claims Act bars §1983 claim against the Virgin Islands).[9]

Although the Wisconsin Supreme Court acknowledged this line of federal court cases rejecting notice of claim requirements in §1983 litigation, it treated the applicability of these cases to §1983 actions as "arguably minimal if not nonexistent."[A-11]

The decision of the Wisconsin Supreme Court, if permitted to stand, encourages the adoption by state courts of policies inhospitable to plaintiffs who prefer to litigate their §1983 claims in state courts. In interpreting §1983 more narrowly than federal courts, the Wisconsin Supreme Court effectively requires many plaintiffs with §1983 claims to select federal courts. When §1983 claimants in Wisconsin, for whatever reasons,[10] do not file notices of claim

[9]Virtually all the district courts that have addressed this issue have also rejected the application of notice of claim requirements to §1983 actions. *See, e.g., Chacon v. Zahorka*, 662 F.Supp. 90 (D. Colo. 1987)(rejecting application of Colorado notice of claim requirement); *Tryon v. Avarra Valley Fire District*, 659 F.Supp. 283, 284-85 (D. Ariz. 1986) (rejecting application of Arizona notice of claim statute); *Craig v. Witucki*, 624 F.Supp. 558, 559-60 (N.D. Ind. 1986) (rejecting application of 180-day Indiana notice of claim requirement in suits against municipal employees); *Meding v. Hurd*, 607 F.Supp. 1088, 1102-03 (D. Del. 1985) (rejecting application of Town Charter requirement that notice be served on mayor within 90 days of injury); *Williams v. Allen*, 616 F.Supp. 653, 656-59 (E.D. N.Y. 1985) (rejecting application of New York notice of claim requirement); *Burroughs v. Holiday Inn*, 621 F.Supp. 351, 353-55 (W.D. N.Y. 1985) (rejecting application of New York notice of claim requirement in actions against municipalities); *Skrapits v. Skala*, 314 F.Supp. 511 (N.D. Ill. 1970) (rejecting application of Illinois six-month notice of claim provision). *But see Cardo v. Lakeland Central School District*, 592 F.Supp. 765, 772-73 (S.D. N.Y. 1984) (applying New York notice of claim requirement.).

[10]At the time plaintiff filed his Second Amended Complaint in March, 1984, no state or federal court had rendered a reported decision requiring compliance with a state notice of claim statute in §1983 litigation. Moreover, the state and federal courts in Wisconsin had explicitly rejected the use of notice of claim requirements in §1983 actions. *See Perrote v. Percy*, 452 F.Supp. 604, 605 (E.D. Wis. 1978); *Mathias v. City of Milwaukee Depart-*

within 120 days of the incident, such litigants will have little choice other than filing their §1983 claims in federal courts.[11]

In *Maine v. Thiboutot*, 448 U.S. 1 (1980), this Court held that the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. §1988, was applicable in state court §1983 litigation. Justice Brennan, writing for the majority, noted that "[i]f fees were not available in state courts, federalism concerns would be raised because most plaintiffs would have no choice but to bring their complaints concerning state actions to federal courts." *Id.* at 11 n.12. Similarly, if states were permitted to impose conditions to litigating §1983 cases in state courts that do not apply in federal courts, serious federalism concerns would be raised because plaintiffs who could no longer comply with state notice of claim requirements would have no choice but to litigate their §1983 claims in federal courts.[12]

ment of City Development, 377 F.Supp. 497, 500 (E.D. Wis. 1974); *Doe v. Ellis*, 103 Wis.2d 581, 309 N.W.2d 375 (Ct. App. 1981).

Although the Seventh Circuit had not directly addressed the notice of claim issue, in *Hampton v. City of Chicago*, 484 F.2d 602, 607 (7th Cir. 1973), *cert. denied*, 415 U.S. 917 (1974), Justice (then Judge) Stevens rejected the application of the Illinois Tort Immunity Act, ILL. REV. STAT. Ch. 85, §§1-101 *et seq.* (1969), which contained a notice of claim requirement, *see* Ch. 85, §8-102, *repealed by* Pub. Act 84-1431, art.1, §3 (1986), to §1983 litigaion in federal courts as a matter of federal law. *See also Luker v. Nelson*, 341 F.Supp. 111, 116-19 (N.D. I11. 1972) (notice of claim rejected as a matter of state law).

[11]Plaintiffs who do not file notices of claim within the 120-day statutory period may nonetheless comply with §898.80 if the defendants have "actual notice" of the claim and the plaintiffs meet the burden of showing that defendants were not prejudiced. [A-12—A-13] Nonetheless, after the expiration of the 120-day period, few plaintiffs with §1983 claims will risk the uncertainty of filing their § 1983 actions in the Wisconsin state courts.

[12]In addition, plaintiffs to whom the federal courts are closed because of limitations on the power of federal courts, *see, e.g., Green v. Mansour*, 474 U.S. 64 (1986) (eleventh amendment); *Fair Assessment in Real Estate Ass'n v. McNary*, 454 U.S. 100 (1981) (comity), would have no available forum to litigate §1983 claims if they failed to comply with state notice of claim statutes.

Most §1983 litigation has taken place in federal courts since this Court's decison in *Monroe v. Pape*, 365 U.S. 167 (1961), began the modern era of §1983 litgation, but members of this Court have commented on the increase in §1983 litigation since *Monroe* and the resulting impact on federal court caseloads. *See, e.g., Patsy v. Board of Regents of the State of Florida*, 457 U.S. 496, 533 n.20 (1982) (Powell, J., dissenting); *Parratt v. Taylor*, 451 U.S. 527, 554 n.13 (1981) (Powell, J., concurring). In recent years, however, an increasing number of litigants with §1983 claims have filed their federal actions in state courts and an important state court §1983 practice has begun to develop.[13] The application of notice of claim statutes to state but not federal court §1983 litigation, however, wi'l have the inevitable result of arresting this development.

This issue, of course, involves more than federal court caseloads but more importantly goes to the role of state courts in our system of judicial federalism. For state courts to play their proper role in enforcing federal rights, litigants with a choice of forums should not be discouraged from filing §1983 claims in state courts. The Oklahoma Supreme Court recognized this facet of federalism in *Willborn v. City of Tulsa*, 721 P.2d 803 (Okla. 1986), when it refused to exclude from the Oklahoma courts §1983 claims brought by plaintiffs who had not complied with the notice of claim requirement.

> Consistent with our system of judicial federalism, which provides litigants with a double-barreled system of judicial protection, the remedy provided by §1983 may be available even if the state remedy is barred by the statute of limita-

[13]*See* Steinglass, *The Emerging State Court §1983 Action: A Procedural Review*, 38 U. Miami L. Rev. 381 (1984). There are no available statistics on the volume of §1983 litigation in state trial courts, but the increase in reported state appellate court opinions suggests the emergence of a significant state court §1983 practice. *See id.* at 434-35 & nn. 266 & 269.

tions under the Political Subdivision Tort Claims Act. *Id.* at 805 (footnote omitted).

By requiring plaintiffs in state court §1983 litigation to comply with the notice of claim statute, the Wisconsin Supreme Court departed from these basic principles, and it is therefore important that this Court review tnis case to determine whether state courts may erect barriers that force §1983 litigation into the federal courts.

III. THE WRIT SHOULD BE GRANTED BECAUSE THE DECISION OF THE WISCONSIN SUPREME COURT CONFLICTS WITH DECISIONS OF THIS COURT REQUIRING STATE COURTS THAT ENTERTAIN FEDERALLY-CREATED ACTIONS, INCLUDING §1983 ACTIONS, TO APPLY THE ENTIRE FEDERAL CAUSE OF ACTION WITH ALL ITS REMEDIAL ATTRIBUTES.

This Court has expressly reserved the issue of whether state courts are obligated to entertain §1983 actions,[14] but it has addressed the proper approach for state courts to take when entertaining federally-created actions. The decision of the Wisconsin Supreme Court, however, conflicts with decisions of this Court requiring state courts that entertain federally-created actions, including §1983 actions, to apply the entire federal cause of action with all its remedial attributes.

In the present case, the Wisconsin Supreme Court described the state notice of claim requirement as procedural and held that §1983 "litigants who choose to press their claims in state court cannot 'elect' to ignore [state] procedural rules."[15] [A-12]

[14] *See Maine v. Thiboutot*, 448 U.S. 1, 3 n.1 (1980); *Martinez v. California*, 444 U.S. 277, 283 n.7 (1980).

[15] In reaching this conclusion, the Wisconsin Supreme Court expressly relied on the tenth amendment, which it held barred Congress from "'prescrib[ing] the procedural scheme under which [federal] claims may be heard in state court.'" [A- 12] In taking this position, the court relied on *Kramer v. Horton*, 128 Wis.2d 404, 383 N.W.2d 54, *cert. denied*, 107 S.Ct. 324 (1986), its §1983 exhaustion case. However, neither *Kramer* nor the present case discuss or even cite *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985), or any of this Court's tenth amendment cases. Although this Court has not directly addressed whether (or the extent to which) the tenth amendment prohibits Congress from regulating "procedural" attributes of §1983 actions in state courts, the Wisconsin Supreme Court's conclusion that the tenth amendment reserves to the states the power to require the use of state policies to govern state court litigation of federal actions is inconsistent with the assumption of many decisions of this Court requiring federal remedial policies to be followed by state courts. *See, e.g., Dice v. Akron, Canton & Youngstown R. Co.*, 342 U.S. 359 (1952) (trial by jury); *Brown v. Western Ry. of Ala.*, 338 U.S. 294 (1949) (pleading requirements); *Central Vt. Ry. v. White*, 238 U.S. 507 (1915) (burden of proof). *See generally* Hill, *Substance and Procedure in State FELA Actions – The Converse Of The Erie Problem?*, 17 Ohio St. L. J. 384 (1956).

The characterization of the notice of claim requirement as procedural by the Wisconsin Supreme Court, however, does not support the use of state policies that limit access to state courts by litigants with federal causes of action, and this Court has required state courts entertaining federal causes of action, including §1983 actions, to refrain from imposing state policies that burden the litigation of federal claims or conflict with the federal definition of the cause of action.

In *Davis v. Wechsler*, 263 U.S. 22 (1923), a personal injury suit against a railroad under federal control during World War I, this Court ruled that the state practice with respect to the waiver of a venue defense could not defeat the assertion of the federal right, noting that "whatever springes the State may set for those who are endeavoring to assert rights that the State confers, the assertion of federal rights, when plainly and reasonably made, is not to

be defeated under the name of local practice." *Id.* at 24.

Similarly, in *Garrett v. Moore-McCormack Co.*, 317 U.S. 239 (1942), an action under the federal Merchant Marine Act, this Court rejected the characterization of a state policy as procedural and required the state courts to follow federal policies. *Garrett* involved the burden of proof on the validity of releases of liability, and this Court rejected the application of a state policy that imposed the burden on plaintiffs because it altered rights established under federal law, which placed the burden on the ship owner. The fact that the state had voluntarily opened its courts to the federal cause of action was enough to require it to give the plaintiff "the benefit of the full scope of these [federally-created] rights." Moreover, the characterization of the state rule as procedural did not give the state courts authority to reject a policy that "inhered" in the cause of action. *Id.* at 249.

Finally, in *Brown v. Western Railway of Alabama*, 338 U.S. 294 (1949), this Court indicated its willingness to reject state practices that unnecessarily burdened rights arising under federal law. In *Brown*, a strict state pleading rule resulted in the dismissal of the plaintiff's FELA complaint. This Court granted certiorari "because the implications of the dismissal were considered important to a correct and uniform application of the federal act in the state and federal courts." *Id.* at 295. Noting that "this federal right cannot be defeated by the forms of local practice," this Court reversed the dismissal. *Id.*

This Court has also specifically rejected the application of notice of claim requirements to federally-created actions. In *El Paso & Northeastern Railway Co. v. Gutierrez*, 215 U.S. 87 (1909), a widow filed a claim against a railroad in state court under the Federal Employers' Liability Act of 1906 for

damages arising out of the death of her husband. The railroad's sole defense was that the plaintiff had failed to comply with a territorial notice of claim statute. Relying on the principle that "an act of Congress undertaking to regulate commerce in the District of Columbia and territories of the United States would necessarily supersede the territorial law regulating the same subject," *id.* at 93, this Court held that the widow's failure to comply with the notice of claim requirement did not bar her from litigating her federal claims in state court.

The decision of the Wisconsin Supreme Court in this case is in direct conflict with this Court's approach to notice of claim requirements in *Gutierrez*.

This Court has also applied the approach developed in *Davis*, *Garrett*, *Brown*, and *Gutierrez* to §1983 actions arising in state courts. Although this Court has not addressed the precise issue of the obligation of state courts to entertain §1983 actions without regard to state notice of claim statutes, it has required state courts to first define the scope of the §1983 action and to then apply all the policies that are part of the federally-defined cause of action.

In *Martinez v. California*, 444 U.S. 277 (1980), this Court refused to allow a state immunity statute to be used as a defense to a §1983 claim, even though the action was being litigated in state court. In rejecting the application of the state-created immunity, this Court made clear that federal law is controlling.

> Conduct by persons acting under color of state law which is wrongful under 42 U.S.C. §1983 ... cannot be immunized by state law. A construction of the federal statute which permitted a state immunity defense to have controlling effect would transmute a basic guarantee into an illusory promise; and the supremacy clause of the Constitution insures that the proper construction may be enforced ... The immunity claim raises a question of federal law.
>
> *Id.* at 284 n.8 (quoting *Hampton v. City of Chicago*, 484 F.2d 602, 607 (7th Cir. 1973), *cert. denied*, 415 U.S. 917 (1974)).

In *Maine v. Thiboutot*, 448 U.S. 1 (1980), this Court again took the opportunity to make clear that the policies generally applicable to §1983 were also applicable when §1983 claims were brought in state courts. In *Thiboutot*, this Court held that the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. §1988, applied equally to federal and state court litigation, despite the fact that the Fees Act does not expressly authorize state courts to award fees. In reaching this conclusion, the Court relied on the Fees Act and its legislative history, including the characterization of the fee provision as an "integral" part of the §1983 remedy. *Id.* at 11.

The present case also raises important issues as to the proper approach by state courts to §1983 actions beyond notice of claim statutes. Many state courts are reluctant to abandon familiar state policies when entertaining §1983 actions. For example, in the present case, the Wisconsin Supreme Court relied on *Kramer*, in which it limited *Patsy v. Board of Regents of the State of Florida*, 457 U.S. 496 (1982), to federal court and required the exhaustion of administrative remedies in state court §1983 litigation.[16] Such a narrow reading of *Patsy*, however, has been described by Justice White as "questionable," *see Caylor v. City of Red Bluff*, 106 S.Ct. 605 (1985) (White, J., dissenting), *denying cert.*

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[16]*Accord Bartschi v. Chico Community Memorial Hosp.*, 137 Cal. App.3d 502, 187 Cal. Rptr. 61 (1982) (*Patsy* inapplicable in state courts); *State ex rel. Barsham v. Indiana Medical Licensing Bd.*, 451 N.E. 2d 691 (Ind. Ct. App. 1983) (same); *McConnell v. City of Seattle*, 44 Wash. App. 316, 722 P.2d 121 (same), *review denied*, 107 Wash. 2d 1007 (1986). *But see Fetterman v. University of Conn.*, 192 Conn. 539, 473 A.2d 1176 (1984) (holding *Patsy* applicable to state court §1983 litigation); *O'Connors v. Helfgott*, 481 A.2d 388 (R.I. 1984) (same); *Logan v. Southern Cal. Rapid Transit Dist.*, 136 Cal. App.3d 116, 185 Cal. Rptr. 878 (1983) (same); *Maryland Nat'l Capital Park & Planning Comm'n v. Crawford*, 59 Md. App. 276, 475 A.2d 494 (1984) (same), *aff'd on other grounds*, 307 Md. 1, 511 A.2d 1079 (1986).

to No. 3 Civ. 21263 (Cal. Ct. App. March 26, 1985), and reflects a basic misunderstanding of this Court's role in defining federal causes of action that may be litigated in both state and federal courts.

The initial questions that state and federal courts entertaining §1983 actions must address involve the scope of the §1983 cause of action. When federal courts define §1983 but find a gap or a deficiency in federal law, they are directed by the civil rights choice of law statute, 42 U.S.C. §1988, to look to state law for the appropriate policy.[17]

When state courts entertain §1983 actions, however, there is an issue as to whether they may use their otherwise applicable state policies. Nonetheless, state courts must also go through the same process of defining the scope of the §1983 cause of action. It is this threshold issue that state courts often overlook while rushing to decide whether state policies are inconsistent with the purposes of §1983 or burden §1983 litigation. Such questions, however, should only be asked *after* a state court has defined the scope of §1983 and required compliance with a state policy.

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[17]*See Burnett v. Grattan*, 468 U.S. 42, 47-48 (1984) (describing three-step borrowing process under §1988). Federal courts that have followed this approach to the application of notice of claim requirements to §1983 litigation have found federal law not to be deficient and thus have not had any need to look to state law. *See, e.g., Brown v. United States*, 742 F.2d 1498, 1504-07 (D.C. Cir. 1984) (en banc), *cert. denied*, 471 U.S. 1073 (1985); *Burroughs v. Holiday Inn*, 621 F.Supp. 351, 354 (W.D.N.Y. 1985); *Williams v. Allen*, 616 F.Supp. 653 (E.D. N.Y. 1985). Even if a federal court found the absence of a notice of claim provision to be a "deficiency" in federal law, the federal court would only be required to borrow the state policy if the policy was appropriate in light of the purposes of §1983. *See Burnett*, 468 U.S. at 52-53. Moreover, a borrowed state policy can also be rejected under the inconsistency clause of §1988. *Id.* at 53 n.15.

By failing to first define the scope of the federally-created §1983 cause of action, the Wisconsin Supreme Court departed from the approach this Court has followed in construing federally-created actions, including actions authorized by §1983.

IV. THE WRIT SHOULD BE GRANTED BECAUSE THE DECISION OF THE WISCONSIN SUPREME COURT CONFLICTS WITH PRINCIPLES DEVELOPED BY THIS COURT IN CONSTRUING §1983.

The decision of the Wisconsin Supreme Court requiring compliance with §893.80, the notice of claim statute, is inconsistent with principles developed by this Court in construing §1983.

In *Patsy v. Board of Regents of the State of Florida*, 457 U.S. 496 (1982), this Court held that "exhaustion of state administrative remedies should not be required as a prerequisite to bringing an action pursuant to §1983." *Id.* at 516. In construing §1983 to guarantee immediate access to judicial forums, the *Patsy* Court did not expressly nor implicitly limit its construction of §1983 to cases filed in federal court.

In finding the notice of claim statute applicable to §1983 actions, the Wisconsin Supreme Court stated, "that the primary purpose of a notice of claim statute is to give the municipality the opportunity to attempt to compromise the claim and effect settlement before the parties are forced to proceed with a lengthy or costly lawsuit."[18] [A-9] Although the

[18]The Wisconsin notice of claim requirement is applicable to any cause of action, including injunction actions. *See* App. 9a n.3, and *Figgs v. City of Milwaukee*, 121 Wis.2d 44, 52, 357 N.W.2d 548, 553 (1984).

Under the notice of claim statute, claimants who file a statutory notice may not commence a civil proceeding until the

notice of claim statute, unlike an exhaustion of administrative remedies requirement, does not provide claimants with administrative hearings, the application of the notice of claim statute to §1983 litigation denies plaintiffs the immediate access to judicial forums that the *Patsy* Court construed §1983 as guaranteeing.

The use of the Wisconsin 120-day notice of claim requirement in state court §1983 litigation is also inconsistent with this Court's approach to the selection of the appropriate statute of limitations in §1983 litigation. In *Wilson v. Garcia*, 471 U.S. 261 (1985), this Court required the use of the limitations period for personal actions and specifically rejected the borrowing of a limitations period for wrongs committed by public officials. *Id.* at 279. Although the notice of claim statute does not require the commencement of litigation within 120 days of the event giving rise to the claim, it requires §1983 litigants to take significant steps within the 120-day period, including the filing of a statutory notice that not only recites the facts giving rise to the injuries but also indicates an intent to hold the city responsible for the resulting damages. [A-14]

Such short limitation periods also fail to give §1983 plaintiffs adequate time to prepare civil rights litigation, *see Burnett v. Grattan*, 468 U.S 42, 50-51 (1984), and are inconsistent with this Court's purpose in *Wilson* of selecting the neutral limitations period for personal actions to assure that states would not intentionally or otherwise discriminate against §1983 claims. *See Wilson*, 471 U.S. at 279.

claim is disallowed or 120 days elapse. §893.80(1) (b). After that time period, they have six months to commence a civil action. *Id.* The Wisconsin Supreme Court in the present case did not address whether either this waiting period or statute of limitations applied to state court §1983 actions.

The use of notice of claim requirements derived from state tort claims acts is also inconsistent with this Court's approach to §1983 immunity issues, which this Court has consistently treated as matters of federal law. *See, e.g., Owen v. City of Independence*, 445 U.S. 622 (1980); *Martinez v. California*, 444 U.S. 277 (1980); *Scheuer v. Rhodes*, 416 U.S. 232 (1974).

The Wisconsin notice of claim requirement is part and parcel of the statute that re-introduced governmental immunity in Wisconsin following its abrogation by the Wisconsin Supreme Court in *Holytz v. Milwaukee*, 17 Wis.2d 26, 115 N.W.2d 618 (1962).[19] *See* A-17 (Abrahamson, J., dissenting). By applying this notice of claim requirement to §1983 litigation, the Wisconsin Supreme Court departed from principles established by this Court and denied access to state judicial forums to §1983 plaintiffs.

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[19]State and federal courts that have traced notice of claim requirements to state immunity doctrines have rejected their applicability to §1983 litigation. *See, e.g., Brown v. United States*, 742 F.2d 1498, 1508-09 (D.C. Cir. 1984) (en banc), *cert. denied*, 471 U.S. 1073 (1985); *Donovan v. Reinbold*, 433 F.2d 738, 741 (9th Cir. 1970); *Williams v. Horvath*, 16 Cal.3d 834, 548 P.2d 1125, 129 Cal. Rptr. 453 (1976).

CONCLUSION

For these reasons, a writ of certiorari should be issued to review the judgment and opinion of the Wisconsin Supreme Court.

Respectfully submitted,

September, 1987

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APPENDIX

No. 85-1344

STATE OF WISCONSIN

IN SUPREME COURT

Bobby Felder,
Plaintiff-Appelant and
Cross-Respondent and Cross-Petitioner,

v.

Duane Casey, Patrick Eaton,
Robert Farkas, Peter Pochowski,
Robert Connolly, Edward Heideman,
Stanley Olsen, Roger Weber,
Michael Kempfer and Gary Hoffman,
Defendants-Respondents and
Cross-Appellants-Petitioners.

REVIEW of a decision of the Court of Appeals. *Reversed and remanded.*

LOUIS J. CECI, J. This is a review of an unpublished decision of the court of appeals, dated April 24, 1986, which reversed in part and affirmed in part a judgement by the circuit court for Milwaukee county, Circuit Judge Robert W. Landry. Specifically, the appeals court reversed the trial court's determination that the two-year statute of limitations period under §893.57, Stats., was to be applied retroactively to the civil rights claims brought by Bobby Felder under 42 U.S.C. §§1983 and 1985, against several city of Milwaukee police officers. The appeals court decided that the three-year statute of limitations, §893.54(1), should apply to Felder's claim instead of the two-year period. Second, the appeals court affirmed the trial court's holding that §893.80, Stats., the notice of claim statute, was inapplicable to §1983 actions brought in state court. Finally, the appeals court affirmed the

trial court's decision that the mere existence of state tort remedies, under which Felder might have recovered, should not operate to preclude the institution of an action based on §1983. While the issue of the applicability of §893.80 to §1983 actions brought in state court against municipalities and municipal employees presents a question of first impression, we believe that this case may be disposed of on the basis of §893.80 alone.[1] Because we believe that §893.80 does apply to federal civil rights actions which are brought in state court and because Felder

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[1]Section 893.80(1), Stats., provides that:

"*Claims against governmental bodies or officers, agents or employes; notice of injury; limitation of damages and suits.* (1) Except as provided in sub. (1m), no action may be brought or maintained against any ... governmental subdivision or agency thereof nor against any officer, official, agent or employe of the ... subdivision or agency for acts done in their official capacity or in the course of their agency or employment upon a claim or cause of action unless:

"(a) Within 120 days after the happening of the event giving rise to the claim, written notice of the circumstances of the claim signed by the party, agent or attorney is served on the ... governmental subdivision or agency and on the officer, official, agent or employe under s. 801.11. Failure to give the requisite notice shall not bar action on the claim if the ... subdivision or agency had actual notice of the claim and the claimant shows to the satisfaction of the court that the delay or failure to give the requisite notice has not been prejudicial to the defendant ... subdivision or agency or to the defendant officer, official, agent or employe; and

"(b) A claim containing the address of the claimant and an itemized statement of the relief sought is presented to the appropriate clerk or person who performs the duties of a clerk or secretary for the defendant ... subdivision or agency and the claim is disallowed. Failure of the appropriate body to disallow within 120 days after presentation is a disallowance. Notice of disallowance shall be served on the claimant by registered or certified mail and the receipt therefor, signed by the claimant, or the returned registered letter, shall be proof of service. No action on a claim against any defendant ... subdivision or agency nor against any defendant officer, official, agent or employe, may be brought after 6 months from the date of service of the notice, and the notice shall contain a statement to that effect."

has not satisfied the requirements of that statute, we reverse the decision of the court of appeals. Since our holding operates to bar Felder from proceeding further, we need not, under these facts, consider the remaining issues posed by the parties.

I.

Bobby Felder was stopped by Milwaukee police officers during the early evening hours of July 4, 1981, outside his home in Milwaukee. Police were combing the neighborhood, looking for an armed individual who was reported to be in the area. The police stopped Felder to question him, but according to police reports, Felder was uncooperative and began to yell and shout profanities, thereby attracting neighborhood attention. Neighbors' attempts to exonerate him were successful, as the police reportedly told Felder to leave the scene and go home. However, Felder continued to be loud and abusive and reportedly pushed an officer. Minutes later, members of the Milwaukee Police Department Tactical Enforcement Unit (TEU officers) arrived on the scene. The TEU officers proceeded to arrest Felder on charges of disorderly conduct. Felder alleges that the officers "beat [him] with batons, carried him to a paddy wagon while he was partially unconscious, and threw him through the air and into the paddy wagon." The charges against Felder, who is black, were ultimately dropped. The officers present at the scene of the arrest were all white. An armed individual was later apprehended and arrested pursuant to the officers' initial investigation.

On April 2, 1982, Bobby Felder commenced a lawsuit in Milwaukee county circuit court, naming two Milwaukee police officers as defendants. Two amended complaints (one filed in January, 1983, and the other in March, 1984) named additional police officers as defendants, as well as the city of Milwaukee and the chief of police for the Milwaukee police

department. The complaint alleged that the defendants acted under color of law to intentionally deprive Felder of his civil rights under 42 U.S.C. §§1983 and 1985(2). Felder also advanced state law tort and conspiracy claims. Felder sought compensatory and punitive damages in an amount totaling $2.3 million, plus costs and attorney fees, as provided for under 42 U.S.C. §1988.

In each of their answers, including the answers to the first and second amended complaints, defendants raised the affirmative defense of noncompliance with §893.80, Stats.

Following the voluntary dismissal of the action as to several of the defendants and the dismissal of some of the claims, trial proceeded on March 4, 1985, on four remaining claims: (1) false arrest, in violation of federal and state law; (2) use of excessive force, in violation of the Fourteenth Amendment to the United States Constitution, and assault and battery, in violation of state law; (3) false imprisonment, in violation of federal and state law; (4) conspiracy, in violation of the Fourteenth Amendment and state law.

After the defense rested its case, the trial court entertained several motions. Defendants first moved for dismissal on the basis of plaintiff's alleged failure to comply with §893.80, Stats. The court granted defendants' motions with respect to each of the claims which were based on state tort law principles, but denied the motion with respect to the remaining civil rights claims which were based on federal law. The court reasoned that §893.80 was not intended to bar the institution of a lawsuit based on federal civil rights laws. The court heard and decided other motions. In the most significant of these rulings, the trial court held that the two-year statute of limitations for intentional torts, §893.57, Stats., applied to Felder's civil rights claims, rather than the

three-year statute of limitations contained in §893.54(1), Stats., applicable generally to "injuries to the person." This holding operated to dismiss Felder's civil rights claims with respect to those defendants who were added to the lawsuit by the amended complaint, which was filed after the two-year limitations period had expired.

Felder appealed the statute of limitations question to the court of appeals. The ten remaining defendants cross-appealed, asserting that the civil rights claims should never have been brought because a notice of claim under §893.80 had never been filed. The appeals court first reversed the trial court on the statute of limitations issue, holding that the three-year period under §893.54(1) was applicable, citing *Wilson v. Garcia*, 471 U.S. 261 (1985), for support. The appeals court next addressed defendants' arguments on cross-appeal, holding that §893.80 was inapplicable to §§1983 and 1985 actions, citing *Doe v. Ellis*, 103 Wis. 2d 581, 587-88, 309 N.W.2d 375 (Ct. App. 1981). The court addressed other arguments raised by defendants in their cross-appeal and summarily affirmed the trial court on those issues. A petition for review was filed on behalf of the police officer defendants by the city attorney of the city of Milwaukee. The city sought review of three issues, including the appeals court's dispostion of the statute of limitations question and its summary affirmance of the trial court's ruling which was based on §893.80, Stats. Felder filed a cross-petition for review, arguing a violation of his constitutional rights based on actions taken by the court during the course of trial, primarily relating to the dismissal of certain defendants from the lawsuit. This court granted both the petition for review and the cross-petition for review on September 16, 1986.

II.

The issues which we believe to be dispositive in this case may be posed as follows: Do the notice of claim provisions contained in §893.80, Stats., apply to federal civil rights actions brought in state court? And, if so, were the statutory requirements enumerated therein complied with in this case?

The city argues that compliance with §893.80 is a condition precedent to the institution of any lawsuit commenced in state court against a municipality or its employees, including a lawsuit which is based on federal civil rights laws. Felder made the choice to proceed in state court and should be bound by state procedures. Section 893.80, the city further argues, is not inconsistent with the U. S. Constitution or federal law. The city argues that states are free to regulate the manner in which cases may be prosecuted in their courts provided that those regulations fall within constitutional limits, citing *Kramer v. Horton*, 128 Wis. 2d 404, 383 N.W.2d 54, *cert. denied* __U.S.__, 107 S.Ct. 324 (1986), in support.[3] The city also cites cases in other jurisdictions where courts have upheld the application of state notice statutes to federal civil rights claims and have stated that those statutes do not offend federal policy. The city states that the purpose of the statute is to enable a municipality to "compromise the claim and settle it without a costly and expensive lawsuit," quoting *Gutter v. Seamandel*, 103 Wis. 2d 1, 9, 308 N.W.2d 403 (1981). This statutory purpose does not frustrate federal law because a plaintiff who complies with the notice requirements retains the opportunity to

[3]The decision of this court in *Kramer* reversed, in part, the decision of the appeals court below. *See*, 125 Wis. 2d 177. For purposes of clarity, we will refer to the decision of the court of appeals as *Kramer I* and will refer to the supreme court decision as *Kramer II*.

negotiate and pursue the §1983 claim. The right to go forward with the civil rights claim remains unaffected. And the municipality, due to the notice requirement, is given the opportunity to investigate the claim and attempt to settle it, if desired, without being forced to proceed immediately to the adversarial setting in the courtroom. Finally, the city reiterates that it is not seeking to enforce the imposition of a state procedural rule in a federal forum; rather, it is seeking only to reaffirm the necessity of imposing state procedural rules on those litigants who choose to press their claims, whether based on state or federal law, in state court. Felder made his choice and should not now be heard to argue that state procedures should not apply to him.

Felder, on the other hand, argues that a state procedural rule cannot operate to preclude a potential litigant from obtaining relief for violations of constitutionally protected rights. Principles of supremacy, Felder argues, should control and operate to preclude application of §893.80 to claims brought in state courts under the federal civil rights laws.

III.

The court of appeals has twice addressed the question of whether the notice of claim statute applies to §1983 actions brought in state court. In *Doe*, 103 Wis. 2d 581, the appeals court held that the notice of claim statute was inapplicable to a lawsuit commenced under §1983, stating that, "We agree that this state procedural statute cannot bar a congressionally created right to obtain relief for violations of federal constitutional rights by persons acting under color of law." 103 Wis. 2d at 588. The court cited *Perrote v. Percy*, 452 F.Supp. 604 (E.D. Wis. 1978), as authority. The court in *Perrote* said that,

> Acceptance of the defendants' position [that the notice of claim statute should apply] would unacceptably elevate subtleties of state procedural law above the avenue of relief

> created by Congress for the protection of federal constitutional rights from deprivations by persons acting with state authority.

452 F.Supp. at 605 (citation omitted). Similarly, in *Kramer v. Horton*, 125 Wis. 2d 177, 371 N.W.2d 801 (Ct. App. 1985) (*Kramer I*), the appeals court, citing *Perrote* and *Doe*, held that the plaintiff's failure to comply with the notice of claim statute did not bar his claim for relief under the federal civil rights laws.

Also at issue in *Kramer* was whether the plaintiff there was required to exhaust his administrative remedies before proceeding with his §1983 action in state court. The appeals court held that the plaintiff was not required to do so. The defendants in *Kramer* petitioned this court for review of that decision, and we held that where state administrative remedies are adequate and available, a plaintiff bringing a §1983 claim is required to exhaust his administrative remedies prior to commencing suit in state court. *Kramer II*, 128 Wis. 2d at 419. In so holding, this court emphasized the inapplicability of *Patsy v. Board of Regents*, 457 U.S. 496 (1982), which held that plaintiffs pursuing §1983 claims need not exhaust administrative remedies before proceeding with litigation in federal court. The court stated that *Patsy* was not controlling under the facts in *Kramer* because *Patsy* involved a §1983 action brought in federal court, *not* state court. State courts and legislatures, as stated in *Kramer II*, retain the right under the Tenth Amendment to the U. S. Constitution "to prescribe the procedural scheme under which claims may be heard in state court." 128 Wis. 2d at 417.

This court noted further in *Kramer II* that a state court may be faced with interests and concerns which are very different from those which a federal court must deal with when deciding whether a given procedural rule, such as the exhaustion of remedies rule, should be adopted. *Id.* The court discussed those interests and concluded that application of the exhaustion doctrine to §1983 suits brought in state court is not "inherently inconsistent with" the purposes §1983 is designed to serve. *Id.* at 418.

This court in *Kramer II* never reached the issue of the applicability of the notice of claim statute to §1983 claims brought in state court. Thus, this case presents a question of first impression.

Previous decisions by this court which have dealt with the notice of claim statute and its statutory predecessors have primarily involved negligence-type actions brought against a municipality or its employees. *See, e.g., Patterman v. Whitewater*, 32 Wis. 2d 350, 145 N.W.2d 705 (1966); *Harte v. Eagle River*, 45 Wis. 2d 513, 173 N.W.2d 683 (1970). It has been said that the primary purpose of a notice of claim statute is to give the municipality the opportunity to attempt to compromise the claim and effect settlement before the parties are forced to proceed with a lengthy or costly lawsuit. *Patterman*, 32 Wis. 2d at 357.

> 'Statutory ... provisions requiring presentation of claims or demands to the governing body of the municipal corporation before an action is instituted are in furtherance of a public policy to prevent needless litigation and to save unnesessary expenses and costs by affording an opportunity amicably to adjust all claims against municipal corporations before suit is brought.'

Id., quoting 38 Am. Jur., *Municipal Corporations*, §674 at 383 (footnote omitted). Significantly, Wisconsin's notice of claim statute was limited, in previous versions, *see*, §895.43, Stats. (1975), only to tort actions. However, the current version of the statute, created by ch. 285, Laws of 1977, is not so limited and states simply that "no action may be brought ... " without statutory or actual notice of the claim.[3]

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[3]In *Figgs v. City of Milwaukee*, 121 Wis. 2d 44, 52, 357 N.W.2d 548 (1984), this court stated that "sec. 893.80 is not a statute only applicable to tort claims or claims for negligence. The opening sentence of sec. 893.80 recites its applicability to *any* cause of action." (Emphasis added.)

Courts in other jurisdictions have explicitly held that notice of claim statutes shall apply to *all* actions, including actions founded on civil rights violations. The city cites *Indiana Dept. of Public Welfare v. Clark*, 478 N.E.2d 699 (Ind. Ct. App. 1985), *cert. denied* __U.S.__, 106 S.Ct. 2893 (1986), as an example. In *Clark*, the Indiana court decided that compliance with a notice of claim provision contained in the Indiana Tort Claims Act was a prerequisite to the institution of a §1983 suit in state court. The court rejected the plaintiff's arguments in *Clark* that the notice of claim provision was contrary to federal policy because it was arguably in the nature of a statute of limitations. Instead, the court stated that the claim provision

> is a procedural precedent which must be fulfilled before filing suit in a state court .... Because it is a procedural precondition to sue, it overrides the procedural framework of §1983 when the litigant chooses a state court forum.

478 N.E.2d at 702 (citations omitted). Also, *see, Mills v. County of Monroe*, 59 N.Y.2d 307, 464 N.Y.S.2d 709, 451 N.E.2d 456, *cert. denied* 464 U.S. 1018 (1983), holding that a state notice of claim statute may be imposed on litigants suing under the federal civil rights laws in state court. With regard to the claim under 42 U.S.C. §1981 at issue in *Mills*, the court stated that,

> Although Congress established no timeliness or notice requirements to apply to section 1981 actions brought in Federal court, these courts have been instructed that, when interstices or voids occur in the Federal law, they should borrow the applicable State rule of law so long as it is not 'inconsistent with the Constitution and laws of the United States' .... This court ... does not find that the State's notice requirements are antithetical to the policy underlying the civil rights laws.

59 N.Y.2d at 309-10, 451 N.E.2d at 457 (quoting 42 U.S.C. §1988; case citations omitted). Also, *see, Robertson v. Wegmann*, 436 U.S. 584, 588 (1978). The court went on to say that a notice of claim statute is meant to serve the important state interest of enabling a municipality to protect itself against stale or

fraudulent claims, concluding that "the general restrictive effect of a state notice of claim requirement does not of itself bar its application to Federal civil rights actions" brought in state court. 59 N.Y.2d at 311, 451 N.E.2d at 458.

We are well aware that courts in other jurisdictions have refused to apply state notice of claim statutes to actions based on a violation of federal civil rights laws. *See, Perrote*, 452 F.Supp. at 605; *Willis v. Reddin*, 418 F.2d 702 (9th Cir. 1969); *Donovan v. Reinbold*, 433 F.2d 738, 742 (9th Cir. 1970); *Rosa v. Cantrell*, 705 F.2d 1208, 1221 (10th Cir. 1982), *cert. denied* 464 U.S. 821 (1983); and *Brown v. United States*, 742 F.2d 1498, 1509 n. 6 (D.C. Cir. 1984), *cert. denied* 471 U.S. 1074 (1985). The city repeatedly indicates, however, that these cases have involved the applicability of state notice provisions to civil rights suits brought *in federal court*. *But see, Williams v. Horvath*, 16 Cal. 3rd 834, 129 Cal. Rptr. 453, 548 P.2d 1125 (1976). Thus, their applicability to these facts--where the issue is whether a state notice of claim statute should be applied to a federal claim brought *in state court*--is arguably minimal, if not nonexistent.[4]

The city argues, persuasively, that our recent holding in *Kramer II* provides substantial support for the proposition that a state may impose procedural requirements on litigants choosing a state forum for adjudication of their federal civil rights claims and that it, and not the cases cited by Felder, *supra*, should be dispositive. We agree. We see no reason why, consistent with our holding in *Kramer II*, a litigant availing himself or herself of state court

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[4]For this reason, we are not convinced by the analysis of the appeals court in *Kramer I* and *Doe*. To support these holdings, the court of appeals necessarily relied on the decision of the federal court in *Perrote*, which involved the distinct question of the applicability of the state notice of claim statute to 42 U.S.C. §1983 claims brought in a *federal* forum.

resources should not be required to abide by state court rules and procedures, including the notice of claim provision at issue here. We now hold that failure to comply with §893.80, Stats., bars a litigant who is pressing a federal civil rights claim from proceeding with that claim in state court. "While the Constitution vests in Congress 'the power to prescribe the basic procedural scheme under which claims may be heard in federal courts,' ... it reserves to the state legislatures and state courts the power to prescribe the procedural scheme under which claims may be heard in state court." *Kramer II*, 128 Wis. 2d at 417 (citation omitted). The point we wish to reiterate is simply that litigants who choose to press their claims in state court cannot "elect" to ignore state procedural rules. The right to sue in state court is accompanied by the corrollary duty to abide by certain rules and procedures. Section 893.80 is an example of just such a procedure.

The remedial and deterrent purposes underlying §1983 actions are not frustrated simply because a state court litigant must abide by state court procedures. The notice of claim statute does not operate to limit the amount that a plaintiff might recover for a violation of his or her civil rights.[5] Nor does the notice requirement operate to preclude a plaintiff's possibility for recovery. The plaintiff remains free, of course, to litigate the civil rights claims in federal court. *See, Kramer II*, 128 Wis. 2d at 419. Our holding in no way precludes plaintiff from pursuing that option.

Even if the plaintiff gave no statutorily required written notice, and it is undisputed that he did not, that failure is not fatal under the statute if the city had "actual notice" of the claim *and* if the plaintiff

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[5]Analogies made by Felder to *Thompson v. Village of Hales Corners*, 115 Wis. 2d 289, 340 N.W.2d 704 (1983), are therefore inapplicable.

shows that the failure to give notice was not prejudicial to the city. Felder contends that the city received actual notice of his claim within hours of his arrest. He points to the presence of city of Milwaukee alderman Roy Nabors at the scene of the arrest and argues that the city police department had completed the initial phase of its investigation into the Felder arrest within hours of its occurrence. Felder further maintains that the city was not prejudiced by plaintiff's failure to provide it with statutory notice of the claim.

It is conceded that a police investigation into Felder's arrest was underway shortly after its occurrence. The record contains several police reports, each of which was individually prepared by the various officers who were present during the arrest or who directly participated in it. The police captain in charge of the district in which the arrest occurred was made aware of the arrest and of the various police reports. The record also reflects that alderman Nabors contacted then police chief Harold Breier, by letter, to personally inform him of the Felder incident.[6] Felder argues that these facts would support a finding that the city had actual notice of the claim, sufficient to satisfy the statute.

We disagree. In *Nielsen v. Town of Silver Cliff*, 112 Wis. 2d 574, 334 N.W. 2d 242 (1983), we held that the defendant municipality had actual notice of the

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[6]Alderman Nabors' letter, dated July 7, 1981, reads in pertinent part as follows:

"Dear Chief Breier:

"This note conveys the enclosed complaints originally made verbally to me about 10:00 p.m. on July 4, 1981.

" ...

"Please review the enclosed complaints, and let me know the results of your investigation ...."

Attached to the note were the "complaints" of five individuals, each of whom described their recollection of the events of the evening in question.

plaintiffs' claim, despite the fact that the written communications said to satisfy the actual notice standard were not received until more than 120 days after the event causing the injury had occurred. However, the "actual notice" came in the form of two letters: (1) a letter from plaintiffs' attorney to the city's insurer, notifying the insurer of his clients' injuries, and (2) a letter to the municipality from the plaintiffs themselves which included a *claim for damages*. 112 Wis. 2d at 581. The court in *Silver Cliff* cited *Wiss v. Milwaukee*, 79 Wis. 2d 213, 255 N.W. 2d 496 (1977), to support its holding. In *Weiss*, it was also undisputed that the defendant municipality never received timely written notice. However, the court there found that, again, a written claim for damages, submitted nearly two years after the accident in question, was sufficient to satisfy the "actual notice" standard. 79 Wis. 2d at 223, 228.

While we do not hold that a detailed claim for damages must be submitted before the actual notice standard can be satisfied, *see, Figgs*, 121 Wis. 2d at 51-52, we nevertheless do not believe that the communication from alderman Nabors is sufficient to satisfy the actual notice standard. Nor are the "communications" to the city via the district police reports sufficient. Documents which have been held to constitute adequate notice have usually, at a minimum, recited the facts giving rise to the injury and have indicated an intent on the plaintiffs' part to hold the city responsible for any damages resulting from the injury. *See Patterman*, 32 Wis. 2d at 353-54; *Harte*, 45 Wis. 2d at 521; *Silver Cliff*, 112 Wis. 2d at 576; *Figgs*, 121 Wis. 2d at 47; *Gutter*, 103 Wis. 2d at 5; *Lang v. Cumberland*, 18 Wis. 2d 157, 158, 118 N.W.2d 114 (1962).

The record in this case does not support a finding of actual notice. Therefore, we need not delve into the question of whether the city suffered prejudice as a result of the plaintiff's failure to provide notice. In

sum, we hold that plaintiffs advancing federal civil rights claims in state court are required to comply with the notice of claim statute, §893.80, Stats. Felder's failure to do so here, via either statutory or actual notice, operates to preclude him from proceeding further in this action in state court. We therefore reverse the decision of the court of appeals and remand to the trial court with instructions to dismiss this action.

By the Court.--The decision of the court of appeals is reversed, and the cause is remanded to the circuit court with instructions.

No. 85-1344

STATE OF WISCONSIN
IN SUPREME COURT

BOBBY FELDER,
Plaintiff-Appellant, Cross-Respondent
and Cross-Petitioner,

v.

DUANE CASEY, et al.,
Defendants-Respondents
and Cross-Appellant-Petitioners.

SHIRLEY S. ABRAHAMSON, J. (dissenting). The court's holding bars a citizen of Milwaukee who alleges he was beaten by police officers from seeking a federal remedy (sec. 1983) in state court because he did not file written notice of the circumstances of his claim. This court maintains this position even though the city concedes it was actually notified (but not in compliance with the statute), and the circuit court made no finding with regard to whether the city suffered any prejudice as a result of the plaintiff's failure to file the notice.

I cannot join the majority in concluding that the notice of claims provision (sec. 893.80), enacted in response to the abrogation of sovereign immunity, was intended to or should somehow override a federally created remedy designed to vindicate civil rights.

I conclude that sec. 893.80 is inapplicable to this lawsuit for two reasons: the intent of Congress and the intent of the Wisconsin legislature. Neither Congress nor the Wisconsin legislature intended the

Wisconsin notice of claims statute to apply to a 1983 action is state courts.

The United States Supreme Court has apparently concluded that Congress intended sec. 1983 actions to be viewed as analogous to claims for personal injuries sounding in tort, not as analogous to state remedies for wrongs committed by public officials. *Wilson v. Garcia*, __U.S.__, 105 S.Ct. 1938. 1949(1985). If this court were to treat this case like a personal injury claim sounding in tort, as Congress apparently intended, and not like a remedy for wrongs committed by a governmental officer, sec. 893.80 would not be applicable. Our court has concluded that state courts dealing with sec. 1983 claims should implement only state laws which are "not inconsistent with the constitution and laws of the United States." *Thompson v. Village of Hales Corners*, 115 Wis. 2d 289, 340 N.W.2d 704 (1983). I conclude that the majority's applying the notice of claims statute (sec. 893.80) is inconsistent with the laws of the United States.

Furthermore, I believe that the Wisconsin legislature did not intend sec. 893.80 to apply to federal causes of action against governmental officers. The Wisconsin legislature adopted sec. 893.80, Stats. 1985-86, in response to *Holytz v. Milwaukee*, 17 Wis. 2d 26, 115 N.W.2d 618 (1962), which abrogated the principle of governemental immunity from tort liability. The state judicial doctrine of governmental immunity is not generally a significant concept in sec. 1983 litigation. *Brown v. United States*, 742 F. 2d 1498, 1507-10 (D.C. Cir. 1984). While I recognize that sec. 893.80 is no longer limited to tort claims, I do not believe that the legislature intended sec. 893.80 to be applicable to this federal cause of action.

For the reasons set forth, I dissent. I am authorized to state that Chief Justice Nathan S. Heffernan joins in this dissent.

No. 85-1344

STATE OF WISCONSIN
IN SUPREME COURT

Bobby Felder,
Plaintiff-Appellant, Cross-Respondent
and Cross-Petitioner,

v.

Duane Casey, Patrick Eaton, Robert Farkas, Peter Pochowski, Robert Connolly, Edward Heideman, Stanley Olsen, Roger Weber, Michael Kempfer and Gary Hoffman,
Defendants-Respondents and
Cross-Appellants-Petitioners.

WILLIAM A. BABLITCH, J. (dissenting). Bobby Felder, a black citizen of Milwaukee, was arrested on Independence Day, July 4, 1981, for a crime he did not commit. During the course of the arrest, witnessed by his neighbors and family, he was allegedly beaten by five Milwaukee police officers and thrown partially unconscious into the back of a paddy wagon. Within hours, an alderman from the City was on the scene. Also within hours, the Milwaukee Police Department had other officers on the scene investigating the incident and taking statements from witnesses, a process that continued for two days. By July 7, the Chief of Police was informed of the incident by letter from the alderman who was at the scene. I dissent.

One can scarcely conceive of facts more ripe for resolution under sec. 1983.

Yet the majority today denies Bobby Felder access to the state courts to litigate his sec. 1983 claim.

The majority concludes that his failure to formally file a "Notice of Claim" with the Milwaukee City Clerk within the 120 days set by Wisconsin statutes, sec. 893.80, Stats., denies him access to the state courts. Although that statute also allows *actual* notice in lieu of formal written notice, the majority concludes that no *actual* notice of this incident was given to the City.

In *Perrote v. Percy*, 452 F. Supp. 604 (E.D. Wis. 1978) the court ruled the notice provision of sec. 895.45(1), Stats. 1975, (actions against state officials) did not apply to a sec. 1983 action because

> "[a]cceptance of the defendants' position would unacceptably elevate subtleties of state procedural law above the avenue of relief created by Congress for the protection of federal constitutional rights from deprivations by persons acting with state authority." *Id.* at 605.

The majority attempts to distinguish *Perrote* by pointing out that *Perrote* was brought in federal court, while this claim was brought in state court. Apparently, the majority preceives that although it is inappropriate to elevate subtleties of state procedural law above the relief Congress intended in federal court, it is appropriate to do so in state court.

I conclude that a 120 day notice requirement is a subtlety of state procedural law that must give way to the vindication of federal rights in state courts.

The failure to do so by the majority is made more egregious by their conclusion that there was no *actual* notice by the City, notwithstanding the facts that the alleged acts were done by five agents of the City, a City alderman came to the scene within hours, an investigation was begun within hours by other police officers, further investigation by police supervisory officers took place within 48 hours, and direct com-

munication was given within three days to the Chief of Police of the City. One of the primary purposes of the notice statute is to allow the government unit an opportunity to promptly investigate such incidents. As this court said in *Nielsen v. Town of Silver Cliff*, 112 Wis. 2d 574, 580, 334 N.W. 2d 242:

> "The purpose of sec. 895.43(1) is to avoid prejudice to governmental units resulting from the late filing of claims. Specifically, the notice requirements are designed to ensure that governmental units have a sufficient opportunity to investigate all incidents giving rise to tort claims. Thorough investigations guard against specious claims and may help prevent similar accidents in the future."

That purpose was more than fulfilled in this case. If these facts and circumstances do not constitute *actual* notice under the statute, "actual notice" has become meaningless.

DISTRICT I

OFFICE OF THE CLERK
COURT OF APPEALS
OF Wisconsin

Marilyn L. Graves
Clerk

Barbara Zack Quindel
1219 N. Cass Street
Milwaukee, WI 53202

To:
R. Scott Ritter
Asst. City Attorney
200 E. Wells Street
Milwaukee, WI 53202

Madison, April 24, 1986
Clerk of Circuit Court
(L.C. #579-956)
(Milwaukee, County)

Hon. Robert W. Landry
Milwaukee Co. Courthouse

You are hereby notified that the Court entered the following opinion and order:

85-1344 Bobby Felder v. Duane Casey, Patrick Eaton, et al.

Before Moser, P.J., Wedemeyer and Sullivan, JJ.

Bobby Felder appeals, in part, from a judgment dismissing his federal civil rights claims against certain employees of the Milwaukee Police Department as barred by the statute of limitations, sec. 893.57, Stats. Eight defendants cross-appeal, asserting that the federal claims were improperly brought. Based on our review of the briefs and record at conference, we conclude that this case is appropriate for summary disposition. *See* Rule 809.21, Stats. We reverse the trial court on the statute of limitations issue, affirm on the issues raised in the cross-appeal, and remand the cause for further proceedings.

Felder, a black man, alleges that on July 4, 1981, several white Milwaukee police officers arrested him for disorderly conduct, beat him with night sticks and threw him into a paddy wagon. After the charges against Felder were dropped, he sought compensatory and punitive damages for violation of his state and federal constitutional rights. He also sought damages for various state torts and a conspiracy to cover up related police misconduct. Felder brought his federal claims under 42 U.S.C. secs. 1983 and 1985(2). On March 4, 1984, Felder filed his second amended complaint, naming as additional defendants the eight police officers who are the cross-appellants.

Four days into trial, the trial court, *sua sponte*, held that the two-year statute of limitations for intentional torts, sec. 893.57, Stats., applied to actions brought under 42 U.S.C. secs. 1983 and 1985(2). Accordingly, the court dismissed the federal civil rights claims against the eight defendants brought into the case by the second amended complaint; Felder appeals.

The United States Supreme Court recently construed 42 U.S.C. sec. 1983 "as a directive to select, in each State, the one most appropriate statute of limitations for all [sec.] 1983 claims." *Wilson v. Garcia*, 105 S. Ct. 1938, 1947 (1985). The Court then characterized all sec. 1983 actions as involving claims for personal injuries. *Id.* at 1949. This court subsequently held that *Wilson* required that all sec. 1983 actions brought in Wisconsin be filed within the three-year limitation period for personal injury actions, sec. 893.54(1), Stats. *Hanson v. Madison Service Corp*, 125 Wis. 2d 138, 141, 370 N.W.2d 586, 588 (Ct. App. 1985). We also held that *Wilson's* interpretation of sec. 1983 is retroactive. *Id.* at 140, 370 N.W.2d at 587. Because Felder filed his second amended complaint within three years of the date on which he was

allegedly arrested and beaten, the trial court erred in dismissing his secs. 1983 and 1985(2) claims.

The police officers cross-appeal, arguing that even if Felder's claims are not barred by the statute of limitations, they are barred by his failure to comply with the notice of claims statute sec. 893.80, Stats., and by *Parratt v. Taylor*, 451 U.S. 527 (1981). We disagree.

The officers' first argument fails because sec. 893.80, Stats., does not apply to federal civil rights claims brought under 42 U.S.C. secs. 1983 and 1985(2). *See Doe v. Ellis*, 103 Wis. 2d 581, 587-88, 309 N.W.2d 375, 377 (Ct. App. 1981) (regarding predecessor statute, sec. 895.45, Stats. (1977)). The officers' second argument that *Parratt* precluded Felder from bringing a sec. 1983 claim against them because a basis for liability existed under state tort law also fails. The United States Supreme Court, since deciding *Parratt*, has stated that "the remedy provided in §1983 [is] independently enforceable whether or not it duplicates a parallel state remedy." *Wilson*, 105 S.Ct. at 1949.

Moreover, *Parratt* is limited implicitly to procedural due process claims and, thus, does not apply to substantive constitutional violations, which are complete at the moment the harm occurs, regardless of any available post-deprivation remedies. *See Gilmere v. City of Atlanta*, 774 F.2d 1495, 1500 (11th Cir. 1985) (en banc). The intentional infliction of personal injury by means of excessive police force is a completed violation of substantive due process and, thus, is outside the scope of *Parratt*. *See id.*; *Wolf-Lillie v. Sonquist*, 699 F.2d 864, 872 (7th Cir. 1983) (substantive due process claims survive *Parratt*). Therefore, the existence of state post-deprivation tort remedies has no bearing on Felder's federal civil rights claims. *Gilmere*, 774 F.2d at 1500.

Upon the foregoing reasons,

IT IS ORDERED that those portions of the judgment entered July 11, 1985, dismissing Felder's federal civil rights claims against those eight defendants who were brought into the case by Felder's second amended complaint are summarily reversed pursuant to Rule 809.21, Stats.

IT IS FURTHER ORDERED that those portions of the judgment entered July 11, 1985, denying the motion for judgment on the pleadings, denying the motion to dismiss for failure to comply with sec. 893.80, Stats., and denying Kempfer's motion to dismiss for failure to state a claim upon which relief could be granted are summarily affirmed pursuant to Rule 809.21, Stats.

IT IS FURTHER ORDERED that the cause is remanded for further proceedings consistent with this opinion.

Marilyn L. Graves
Clerk of Court of Appeals

State of Wisconsin

CIRCUIT COURT

Milwaukee County

BOBBY FELDER
Plaintiff,

v.

MICHAEL KEMPFER, et al.,
Defendants.

AMENDED ORDER FOR JUDGMENT
Case No. 579-956

This action having come before the Court on Febuary 25, 1985, on a motion of the plaintiff to dismiss this action without costs as to defendants John Bauer, Joseph Husar, Harold A. Breier, Leonard Ziolkowski and the City of Milwaukee, and a motion for judgment on the pleadings by all defendants seeking dismissal based upon plaintiff's failure to comply with sec. 893.80, Stats., and

Thereafter, at the close of plaintiff's case, on March 8, 1985 and March 11, 1985, on motions by defendants' and plaintiff's counsel and *sua sponte* action by the Court including, chronologically, a motion to dismiss by all defendants for failure to comply with sec. 893.80, Stats., a motion by all defendants to dismiss all equal protection causes of action based upon failure to state a claim upon which relief could be granted, a motion by defendants Pochowski, Olsen, Weber, Connolly, Heideman, Farkas, Casey and Eaton to dismiss all state tort claims based upon the applicable statute of limitations, sec. 893.57, Stats., *sua sponte* action by the Court dismissing all civil rights claims against defendants Pochowski, Olsen, Weber, Connolly, Heideman, Farkas, Casey and Eaton based upon paragraph 66 of the Second Amended Answer and the applicable statute of

limitations, sec. 893.57, Stats., a motion by plaintiff for clarification/reconsideration of the Court's aforementioned *sua sponte* action, a motion by defendants Kempfer and Hoffman to dismiss the remaining civil rights causes of action against them for failure to state a claim upon which relief could be granted, a motion by plaintiff for a mistrial based upon the Court's prior rulings, a motion by plaintiff to dismiss the remaining causes of action against defendants Kempfer and Hoffman without prejudice, and a motion by defendants Kempfer and Hoffman to dismiss all remaining causes of action against them with prejudice for failure to prosecute, and

The Court having heard arguments of counsel, having considered the applicable statutes and case law, and having issued oral decisions from the bench with respect to each motion, and

The Court having, on April 10, 1985, entered a written order for judgment, and having thereafter, on May 1, 1985, considered plaintiff's objections to said order, and having concluded that the April 10, 1985 order for judgment should be vacated, modified, and then, as modified, entered, now therefore,

IT IS HEREBY ORDERED that:

1. The April 10, 1985 order for judgment is vacated.

2. The motion of plaintiff to dismiss this action without costs as to defendants Bauer, Husar, Breier, Ziolkowski, and the City of Milwaukee is granted.

3. The motion by all defendants for judgment on the pleadings is denied.

4. The motion by all remaining ten defendants to dismiss the action based upon plaintiff's failure to comply with the provisions of sec. 893.80, Stats., is

granted as to all state claims and denied as to all federal claims.

5. The motion by all defendants to dismiss all equal protection causes of action based upon failure to state a claim upon which relief could be granted is taken under advisement.

6. All causes of action are dismissed as to defendants Pochowski, Olsen, Weber, Connolly, Heideman, Farkas, Casey and Eaton based upon the applicable statute of limitations, sec. 893.57, Stats.

7. The motion by plaintiff for clarification/reconsideration of the Court's decision to dismiss all causes of action based upon the applicable statute of limitations, sec. 893.57, Stats., respecting defendants Pochowski, Olsen, Weber, Connolly, Heideman, Farkas, Casey and Eaton is granted, and upon such reconsideration, the Court's decision dismissing those defendants is reaffirmed.

8. The motion by remaining defendants Kempfer and Hoffman to dismiss the civil rights causes of action for failure to state a claim upon which relief could be granted is denied with respect to defendant Kempfer and taken under advisement with respect to defendant Hoffman.

9. The motion by plaintiff for a mistrial is denied.

10. The motion by plaintiff to dismiss the remaining causes of action against defendants Kempfer and Hoffman without prejudice is denied.

11. The motion by defendants Kempfer and Hoffman to dismiss all remaining causes of action against them with prejudice for failure to prosecute pursuant to sec. 805.03, Stats., is granted.

12. The plaintiff's complaint against all defendants is hereby dismissed upon the merits and the defendants Pochowski, Olsen, Weber, Connolly, Heideman, Farkas, Casey, Eaton, Kempfer and Hof-

fman are, pursuant to sec. 814.03, Stats., awarded all costs and disbursements as are allowed by law.

LET JUDGMENT BE ENTERED ACCORDINGLY.

Dated at Milwaukee, Wisconsin this 23 day of May, 1985.

BY THE COURT:
/s/Hon. ROBERT W. LANDRY
Hon. ROBERT W. LANDRY
Circuit Court Judge